

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
SIDE JURISDICTION
CRIMINAL APPEAL NO.822 OF 2006**

Ms. Daisy Angus
a British National, aged 25 years,
presently undergoing sentence at
Yervada Central Prison, Yervada,
Pune
V/s. ...Appellant.

1. Union of India
At the instance of the The
Superintendent of Customs,
Air Intelligence Unit,
Sahar Airport, Mumbai

2. State of Maharashtra ...Respondents.

Mr.Mahesh Jethmalani a/w Shri Ayaz Khan & Nilofar
Saiyed i/b M/s. Lalla & Lalla for the Appellant.

Mr.H.V.Mehta, advocate for the Respondent No.1.

Mrs.V.R.Bhosale, APP for the Respondent/State.

**CORAM: J.H.BHATIA, J.
DATE : 5th April, 2007.**

ORAL JUDGMENT:

1. The appellant, who is accused no.1 in N.D.P.S.Special Case No.30 of 2003, was convicted by the Special Judge City Civil & Sessions Court, Greater Bombay for the offences punishable under Section 20 (1)(b) read with Section 8(c) of the N.D.P.S.Act and under Sections 28 read with 23 and 8(c) of the N.D.P.S.Act. She was sentenced to undergo R.I. for 10 years and to pay a fine of Rs.1 lakh and in default to undergo further R.I. for one year on each count. By

this appeal, she has challenged the conviction and sentence.

2. Prosecution case in brief, is that the complainant M.Jaykumar Superintendent of Customs Department, was attached to Air Intelligence Unit of Customs at Sahar Airport, Bombay. On 21-11-2002 at about 9.45 p.m., the accused no.1, who is appellant and accused no.2 Yoram Kadesh, who was acquitted by the trial Court, had come with their baggage to the airport with the tickets for Bombay-Amsterdam-Berlin sector issued by North West airlines. The accused no.2 Yoram Kadesh had two bags but they were not checked in. However, the accused no.1 had in all 2 bags, which were submitted for being checked in. North West airlines was maintaining its own X-ray machines for screening the baggage, which were checked in by the passengers. When the baggage of accused no.1 was being checked under the X-Ray machine, one Blue Coloured Delsey zipper suitcase was not cleared. Therefore, the said suitcase was opened and the articles therein were removed but still the bag was unusually heavy. In view of this, staff members of North West airlines immediately gave message to the officers of Air Intelligence Unit of Customs at the Sahar Airport. Officers of Air Intelligence Unit immediately rushed to the spot. It was found that the

said Delsey zipper suitcase was having false bottom with some concealment. It was also noticed that the accused no.1 was accompanied by the accused no.2 Yoram Kadesh, who was an Israeli national and both were travelling together to Berlin. The accused-appellant was having British and French passports. Two panch witnesses were called and they were informed that during the screening and physical check, the security staff had noticed some concealment in the false bottom of blue coloured Delsey zipper suitcase of the appellant. Appellant had identified the said suitcase, besides one more Polo trolley bag and one paper carry bag as belonging to her. On being questioned the appellant denied that she had concealed any narcotic drug in the said bag and she denied any knowledge if the said bag contained any narcotic drug. Thereafter, the appellant alongwith the baggage and the panchas were escorted to the office of A.I.U. for further investigation. As the accused no.2 Yoram Kadesh was earlier seen in conversation with the appellant, he was also intercepted. He was having one black coloured polo trolley bag and one blue coloured zipper handbag. Both these bags were not checked in and on checking no contraband articles were found in those two bags. False bottom of the Delsey zipper suitcase of the present appellant was ripped open and it was found that false bottom consisted of 3 large and 4 small

packets containing brown coloured substance concealed in the specially made cavity in the false bottom. Contents of these packets were tested on the lonscan machine and test was positive for the presence of Hashish. Collective weight of the contents was found to be 10 kg. From each packet 3 samples of 5 gm. each were taken and the same were kept in small polythene bag, which was kept in the envelope and then duly sealed.

3. During the course of investigation statements of the present appellant came to be recorded. According to her she was acquainted with the accused no.2 Yoram Kadesh since 1999 and she had come to India on a short visit in the month of November, 2002. She had paid visit to her parents who were staying in Himachal Pradesh. She had planned to visit Australia for which she had taken ticket but that ticket was to lapse within two days. Therefore, she had given her ticket as well as passport to the accused no.2 for re-validating her ticket. According to her, the accused no.2 asked her whether she would join him upto Berlin as he had excess luggage to be carried to Berlin and he had also offered that she could enjoy holidays at his expense in Germany. Not only this he would make arrangement for his journey from Berlin to Australia at his cost. She accepted his proposal as she also wanted to meet some of her

girlfriends in Germany. This decision was taken when both the accused were in Delhi. According to her she was to join the accused no.2 in Bombay. However, she missed her train on 19-11-2002 and she came late to Bombay. The accused no.2 was staying in hotel Causeway. After getting address from him, she also went to the same hotel and stayed in the same room alongwith the accused no.2. According to her, her bag was torn in the journey, therefore, the accused no.2 offered to put her belongings in his Delsey zipper suitcase as they were to travel together. She agreed. However, she found that inner zipper of the bag was jammed up and, therefore, she packed some of her belongings into the bag. She questioned accused no.2 Yoram Kadesh if there was anything objectionable in the said bag. However, he assured her that she should not worry since it consisted only gifts of incense sticks and he would himself carry bag alongwith him. Thus, though she admitted that she had checked in that bag, she denied that she had any knowledge about the Hashish or any contraband drugs in the same. Thus, she denied conscious possession of the Hashish, which was found concealed in the false bottom of the said Delsey zipper suitcase. Thereafter statement of the accused no.2 was also recorded. He also showed ignorance about the contents of the bag and he denied that he had owned that bag though he admitted

that he had seen the bag in the room of the hotel, after he had come back at about 4.00 p.m. after confirmation of the tickets. Statement of the present appellant was recorded again. She also made written statement before the Special Judge and she took consistent stand that the said Delsey zipper suitcase was given to her by the accused no.2 and she was not aware that it contained any contraband drug. The samples were referred to Chemical Analyser and it was confirmed that they were Hashish. After investigation, the complaint was filed by Jaykumar the Customs Superintendent.

4. Vide Exhibit 2 charge was framed against both the accused. On behalf of the prosecution in all 24 witnesses were examined. Several documents and the statements of the accused persons, recorded under Section 108 of the Customs Act, were placed on record. After hearing the learned Trial Court acquitted accused no.2 Yoram Kadesh but held the present appellant guilty on the charge of being found in possession of narcotic drug and making an attempt to export the same from India and sentenced her as stated above.

5. In the appeal memo several grounds were taken to assail the prosecution story that the present appellant was found in possession of any narcotic drug

and particularly, the Hashish. However, Mr. Jethmalani the learned counsel for the appellant, fairly made a statement at the outset that he would not challenge the prosecution case about recovery, seizure, taking of samples, reference of the same to the experts and the report of the Chemical Analyser. He conceded that in view of the evidence on record, it must be held that in the false bottom of Delsey zipper suitcase about 10 kgs. of Hashish was found concealed and it was in 7 packets as alleged by the prosecution. His main attack against the prosecution is about the conscious possession of the present appellant. He vehemently contended that the present appellant was a young girl aged about 22 years and she was involved in providing health services to the poor people in the different parts of the world and particularly in the backward countries in Africa. She was naive and inexperienced in comparison to the accused no.2 Yoram Kadesh, who was aged about 35 years and who was suspected to be dealing in narcotic drugs even by the customs department and for this purpose the customs department had also tried to make some investigation and collected evidence from Manali in Himachal Pradesh and Goa where brother of Yoram Kadesh was running shops. Even according to the prosecution, the accused no.2 had some dealings about narcotic drugs with some person in Goa and for that purpose the customs authorities had

instructed their local officers to make investigation in this line. However, as per the record of customs department itself due to the delay in receiving the message by the officers in Goa, no material or information could be collected against the accused no.2 and his accomplices in Goa. He contended that if the whole matter is viewed from this angle, it would appear that the accused no.2 must have concealed Hashish in the said Delsey zipper suitcase and therefore, he had offered her free journey and stay to Germany at his cost to the present appellant. According to him he had told her that his baggage was excessive therefore, he wanted company of the present appellant and very intelligently he handed over the Delsey zipper suitcase to the appellant after concealing Hashish in the same and made her to check in the said bag as her own and she did not deny the same till then. However, she consistently denied knowledge about the contents of the same. He further contended that because her bag was torn, she accepted the proposal of the accused no.2 to put her belongings in the Delsey zipper suitcase provided by him and then she also checked in the said bag as per own because her belongings were in that bag. According to him, investigating officers did not make appropriate investigation to find out the torn bag, which was left in the hotel room particularly when the managers of the

hotel informed that the rooms are cleaned within 2-3 minutes after the guests checked out from the room and as it was torn bag, it was not to be preserved or retained by the management. According to him the bag must have been thrown away by some sweeper but no attempt was made to record statement of any sweeper who had cleaned the room.

6. Mr.Mehta the learned counsel for the Customs, however, supported the conviction and sentence on the ground that the appellant herself had checked in the said Delsey zipper suitcase as her own bag and, therefore, she was not in a position to deny her possession. She admitted possession of the bag and once in the said bag narcotic drug or Hashish was found, the presumption is against her and burden lies on her to rebut that presumption. According to Mr.Mehta, the appellant did not produce any evidence and she could not rebut the presumption against her and therefore, the learned trial Court was justified in holding that she was in possession of Hashish and was trying to export the same.

7. In view of the stand taken by the learned

counsel for the appellant, controversy in the present appeal is limited only to the conscious possession of the appellant. Before dealing with the evidence of the present case, it will be appropriate to set out legal position in this respect. Section 35 and Section 54 of N.D.P.S.Act read as follows:

35. Presumption of culpable mental state.-

(1) In any prosecution for an offence under this Act, which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

(2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability.

54. Presumption from possession of illicit articles.-

In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of -

(a) any narcotic drug or psychotropic substance or controlled substance;

(b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;

(c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or controlled substance; or

(d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured, for the possession of which he fails to account satisfactorily.]

From the language of Section 35, it is clear that in any prosecution for an offence under the N.D.P.S. Act which requires culpable mental state of the accused, the Court shall presume existence of such mental state. However, the presumption is rebuttable. It is for the accused to prove that he had no such mental state with respect to the act charged as an offence in that prosecution. In view of this section "culpable mental state" includes knowledge of a fact and belief in, or reasons to believe, a fact. Standard of proof for rebuttal of this presumption is stated in subsection 2 of Section 35. For this purpose, fact is stated to be proved only when the Court believes it to exist beyond a reasonable doubt and not merely when its existence is established by the preponderance of probability. In view of Section 54, unless and until the contrary is proved, it may be presumed that the accused had committed an offence under this Act in respect of narcotic drug for the possession of which he fails to account satisfactorily. From this it is clear that burden is on the accused to account for

possession satisfactorily to rebut this presumption also.

8. About the standard of proof for rebuttal of the presumption under Section 35, Mr. Jethmalani placed reliance on **Abdul Rashid Ibrahim Mansuri v. State of Gujarat 2000(1) SC 471** wherein gunny bags containing charas were stacked in the auto-rickshaw. Two other persons were arrayed but not arrested in the matter. Rickshaw driver was put to the trial. According to him the gunny bags were stacked in the auto-rickshaw by the passengers and he had no knowledge about the contents of the same. Thus, even though the bags containing charas were found in the rickshaw in his possession still he was not in conscious possession of the contraband charas. After dealing with the facts of the case, Their Lordships of the Supreme Court observed as follows:

"21. No doubt, when the appellant admitted that narcotic drug was recovered from the gunny bags stacked in the auto-rickshaw, the burden of proof is on him to prove that he had no knowledge about the fact that those gunny bags contained such a substance. The standard of such proof is delineated in subsection (2) as "beyond a reasonable doubt". If the court, on an appraisal of the entire evidence does not entertain doubt of a reasonable degree that he had real knowledge of the nature of the substance concealed in the gunny bags then the appellant is not entitled to acquittal. However, if the court entertain strong doubt regarding the accused's awareness about the

nature of the substance in the gunny bags, it would be a miscarriage of criminal justice to convict him of the offence keeping such strong doubt dispelled. Even so, it is for the accused to dispel any doubt in that regard.

22. The burden of proof cast on the accused under Section 35 can be discharged through different modes. One is that, he can rely on the materials available in the prosecution evidence. Next is, in addition to that he can elicit answers from prosecution witnesses through cross-examination to dispel any such doubt. He may also adduce other evidence when he is called upon to enter on his defence. In other words, if circumstances appearing in prosecution case or in the prosecution evidence are such as to give reasonable assurance to the court that appellant could not have had the knowledge or the required intention, the burden cast on him under Section 35 of the Act would stand discharged even if he has not adduced any other evidence of his own when he is called upon to enter on his defence."

In view of this if the Court entertained strong doubt regarding the accused's awareness about nature of the substance in the bags, benefit of doubt has to be given to the accused.

9. Division bench of this Court had an opportunity to analyse what the possession means in **Rubyana alias Smita Sanjib Bali v. State of Maharashtra 1996 CRI.L.J. 148**. In paragraph 6 of the said judgment, Division Bench referred to several Supreme Court authorities. It will be useful to quote complete paragraph 6 which reads as follows:

"6. The sine qua non for attracting the penal provisions, viz. Section 20 and 21 of the N.D.P.S. Act, and Section 25 read with Section 7 of the Arms Act is that the appellant must be found in possession of the contrabands and the fire arms. The term "possession" is not defined in the N.D.P.S. Act. The term "possession" has been judicially construed to mean, in various decisions, as under:-

'Possession implies dominion and consciousness in the mind of the person having dominion over an object that he has it and that he can exercise it. Possession must be conscious and intelligent possession and not merely the physical presence of the accused in proximity or even in close proximity to the object.

(See in this connection Dula Singh v. Emperor, AIR 1928 Lahore 272 : (1928 (29) Cri. L.J. 481), Kuldip Chand v. Emperor, AIR 1934 Lahore 718 : (1935 (36) Cri. L.J. 300), Sunder Singh v. Emperor, AIR 1936 Lahore 738: (1936 (37) Cri. L.J. 939), and Ram Charan v. Emperor, AIR 1933 All 437 : (1933 (34) Cri. L.J. 930)).

The Apex Court in Supdt. and L.R. v. Anil Kumar Bhunja, (1979) 4 SCC 274 : (1979 Cri. L.J. 1390), observed that the test for determining "whether a person is in possession of anything is whether he is in general control of it. The Apex Court, after examining Salmond's jurisprudence and other earlier decisions rendered by the Court, observed thus (at pp 1392-93 of Cri.L.J.):-

"13. 'Possession' is a polymorphous term which may have different meanings in different contexts. It is impossible to work out a completely logical and precise definition of 'possession' uniformly applicable to all situations in the contexts of all statutes. Dias and Hughes in their book on Jurisprudence say that if a topic ever suffered from too much theorising it is that of 'possession'. Much of this difficulty and confusion is (as pointed out in Salmond's Jurisprudence, 12th Ed. 1966) caused by the fact that possession is not

purely a legal concept. 'Possession', implies a right and a fact; the right to enjoy annexed to the right of property and the fact of the real intention. It involves power of control and intent to control. (See Dias and Hughes, 11th Ed.)

14. According to Pollock and Wright, when a person is in such a relation to a thing that, so far as regards the thing, he can assume, exercise or resume manual control of it at pleasure, and so far as regards other persons, the thing is under the protection of his personal presence, or in or on a house or land occupied by him or in any receptacle belonging to him and under his control, he is in physical possession of the thing.

15. While recognising that 'possession' is not a purely legal concept but also a matter of fact, Salmond (12th Ed. page 552) describes 'possession', in fact", as a relationship between a person and a thing. According to the learned author the test for determining 'whether a person is in possession of anything is whether he is in general control of it."

16. In *Gunwantilal v. State of M.P.* (1973) 1 SCR 508: (1972 Cri.L.J. 1187), this Court while noting that the concept of possession is not easy to comprehend, held that, in the context of Section 25(a) of the Arms Act, 1959, the possession of a firearm must have, firstly, the element of consciousness or knowledge of that possession in the person charged with such offence, and secondly, he has either the actual physical possession of the firearm, or where he has not such physical possession, he has nonetheless a power or control over that weapon. It was further recognised that whether or not the accused had such control or dominion to constitute his possession of the firearm, is a question of fact depending on the facts of each case. In that connection, it was observed (at p 1189 of Cri.L.J.):

In any case disputed question of possession, specific facts submitted or proved will alone establish the existence of the de facto relation of control or the dominion of the person over it necessary to determine whether that person was or was not in possession of the

thing in question."

10. In view of this it is clear that the possession implies dominion and consciousness in the mind of the person having dominion over an object that he has it and that he can exercise it. Possession must be conscious and intelligent possession and not merely the physical presence of the accused in proximity or even in close proximity to the object. A person, who may not have physical possession, may still have power of control over that substance and if it is so, he may be said to be in possession of that article. As Division Bench observed, in any disputed question of possession, the specific facts submitted or proved will alone establish existence of the de facto relation of control or the dominion of the person over it necessary to determine whether that person was or was not in possession of the thing in question. In view of the legal position stated above, it will be necessary to scrutinise and appreciate the evidence on record.

11. P.W.11 Jubin George and P.W. 3 Praful Sawant are the two witnesses, who were working with North West airlines during the relevant night . They were first persons to encounter with the present appellant and the accused no.2. Their evidence reveals that flights of North West airlines take off from Terminal 2A of the

Sahar Airport. These two persons were working with North West Airlines. P.W.11 Jubin George used to man the area in front of North West counter while P.W. 3 Praful Sawant was manning X ray machine on that night. They used to check passengers' tickets, passports, baggages and aircraft cargo, etc. North West Airlines was maintaining its own X ray machines for security purpose. Therefore, passengers going by North West airlines had to check their baggages on the X ray machine. However, hand bags were not screened under the X ray machine. After the bags were checked in they were put to the X ray machine. Stickers were affixed on the locks of those bags. On 21-11-2002 at about 10 p.m. the present appellant and the accused no.2 came to the counter. Initially the tickets, passports and other documents of both the accused were checked at the counter. Accused no.2 did not check in any baggage though he had two bags with him. Both bags were with him as handbags. The appellant checked in baggages and therefore, she was directed towards the X ray machine. While screening the Delsey Zipper suitcase, P.W.13 Praful Sawant noticed that the machine was showing some packets like substance inside the bag. After the bag came out from the said screening machine, he lifted the bag and took it aside and asked both the accused as to whom the said bag belonged. In the examination-in-chief

he deposed that accused no.1 identified the said bag as hers. Accused no.2 confirmed that he was knowing accused no.1. Accused no.2 was with the accused no.1. He did not leave the place nor the lady. During the cross-examination Praful Sawant deposed that when the accused nos.1 and 2 were asked as to whom the said bag belonged , the accused nos.1 and 2 discussed with each other for about 30 seconds and then the appellant replied that it was her bag. Taking into consideration weight of the bag, it was suspicious and, therefore, both the accused were taken to the office of Air Intelligence Unit by the Customs officers.

12. Normally only after the screening, the baggage claim tags are attached to the boarding pass or ticket of the concerned passenger. However, in this case even before the baggages were cleared by the X ray machine, baggage claim tags were issued and as per the evidence on record, both the tags were attached to the tickets of the accused no.2. Mr.Jethmalani vehemently contended that evidence on record clearly shows that passports of the present appellant was with the accused no.2 since when they had decided in Delhi to go to Bombay. Not only her passport was with him, even baggage claim tags were attached to his tickets which indicated that he maintained the control and his possession over the said

bags.

13. P.W.1 Sudip S. Mondal, P.W.12 Mr.Kenneth D'Souza, P.W.5 Satish S. Deshpande and P.W.21 Jaspal Sharma are the officers of the Customs Department. Naturally they came in picture only after P.W.11 Jubin and 13 Praful informed Air Intelligence Unit of the Customs Department that such a suspicious bag was found with the accused persons. Evidence of P.W.1 Sudip S. Mondal and P.W.21 Jaspal Sharma clearly shows that in presence of the panch witnesses, both the accused were confronted with the baggages. Accused no.1, i.e., the present appellant claimed that it was her bag while, accused no.2 denied. Identification panchanama Exhibit 51 was drawn. Therein also the appellant had claimed that bag.

14. As per the evidence of P.W.11 Kenneth D'Souza Customs Superintendent, after the contraband material was found in the bag, he recorded the statement of the present appellant during the same night. That statement is at Exhibit 44. In that statement, the appellant had explained the circumstances in which she had come in possession of the bag. She stated that she had come in contact with the accused no.2 when they were at Delhi. She was to proceed to Australia and for that purpose,

she had taken ticket for Australia. However, that ticket was to expire within 2 days. Because of the old acquaintance with the accused no.2, she requested him to get the tickets revalidated. At that stage the accused no.2 offered her to accompany him to Germany because he had excess luggage and he offered her free journey as well as free stay and holidays at Germany. He also promised her to make arrangement for travelling from Germany to Australia at his cost. As she had also some old girlfriends in Berlin, she was inclined to accompany him and to enjoy the hospitality of the accused no.2. Accused no.2 told her that the expenses of travel from Bombay to Berlin would be less than from Delhi to Berlin and, therefore, they agreed to go Bombay. Accordingly, they booked two tickets for Bombay by Rajdhani Express on 19th November, 2002. She missed the train while, the accused no.2 came to Bombay by that train. She boarded the next train at 5.00 p.m. and reached Bombay Bandra Terminal at 4.00 p.m. on the next day i.e., 20th November, 2002. After going there, she contacted the accused no.2 by E-mail and then by taxi she went to hotel Causeway, where the accused no.2 had checked in. She put her bag in the room, took dinner with the accused no.2 and thereafter in the night, they went to sleep. Next day morning, i.e., on 21st November, 2002 she handed over the accused no.2 Yoram Kadesh her

passport and ticket. Then Yoram Kadesh left for KLM North West Airline office to reconfirm the tickets for 21st night. She stated that as her bag was torn, the accused no.2 Yoram Kadesh had asked her to pack her belongings in the blue coloured Delsey zipper suitcase. According to her when she opened the bag, she felt strong smell of incense sticks and she was curious to know if there was anything else in the bag, therefore, she tried to open the inner zipper but it was jammed up therefore, packed some of her belongings into the bag. On arrival of the accused no.2, she questioned him whether anything is objectionable and out of the way in the bag. But he stated that she should not worry since it consisted only gifts of incense sticks and he would himself carry bag alongwith him. It is admitted by the prosecution witnesses particularly, Mr.D'Souza that she had maintained this stand consistently in the first statement as well as in her second statement, Exhibit 46. It was recorded by him on 19-12-2002 at Arthur Road Jail. Record revealed that on 28-11-2002 the appellant had also submitted written statement Exhibit 47 before the learned trial Court Judge. There also she had taken the same stand.

15. P.W.5 Satish S. Deshpande, Customs Superintendent stated that he had recorded the statement

of the accused no.2 vide Exhibit 22 during the night of 22nd November, 2002. As certain points were missing, he recorded his second statement vide Exhibit 24 also during the same night. As per the explanation in his first statement, the accused no.2 Yoram Kadesh had stated that he had come to Delhi on 13-9-2002 and had stayed in the hotel 'Yes Please' Pahadgunj area, New Delhi. He had also gone to Jaipur and Rajasthan during the stay at Delhi. On 10-11-2002, he met the present appellant and told her about his planning to go to Berlin via Mumbai as air ticket charges were less from Bombay to Berlin. Later on, she also told him that she had a plan to visit Berlin as her sister was there. Both of them agreed to go together to Berlin. However, she told the accused no.2 that she would come back from Rajasthan within 2-3 days and then they would purchase air tickets for Berlin. However, she turned up after a week period. Then she gave her passport to the accused no.2 Yoram Kadesh for booking air tickets. According to him, she paid for her ticket. From his statement read with other documentary evidence, it appears that on 20-11-2002 at about 9.00 a.m. he reached Mumbai by Rajdhani train and he checked in at Hotel Causeway. On the same day at about 9.00 p.m. Accused no.1 also came there from Delhi and stayed in the same room in the hotel alongwith Yoram Kadesh. According to him on the

next day, i.e., on 21-11-2002 at about 10.00 a.m., he left for airlines office situated at Andheri (East) and came back around 4.00 p.m. when the appellant was present in the room. That time he saw the suitcase from which Hashish was recovered at the airport. Thus, in his statement, the accused no.2 Yoram Kadesh did not support the stand taken by the appellant that he had offered her free journey and holidays at Germany and had also assured her free journey from Germany to Australia. He also tried to state that when he had come back at about 4.00 p.m. from airlines office on 21-11-2002, he had seen the said suitcase in the room. In view of this, on behalf of the prosecution it is contended that the same Delsey zipper suitcase must have been kept in the room in his absence by the present appellant. Mr.Jethmalani, however, relied upon the question put to him in his second statement, Exhibit 24 wherein P.W.5 Satish S. Deshpande had specifically put to him that the suitcase containing narcotic drugs under the seizure belonged to him. To this he answered "It is true that the suitcase containing narcotic drug was lying in my hotel room." Mr.Jethmalani contended that when specific opportunity was given to him to explain the ownership of the suitcase, he kept silent about it and he simply stated that he had seen the suitcase in the room but did not deny that the suitcase belonged to him.

16. About the suitcase, evidence of P.W.8 Ajaj Ahmed Abdul Ansari and P.W.10 Momin Abdul Rashid, who were receptionist and manager respectively at the hotel Causeway during the relevant period is material. These two witnesses after referring to the hotel record proved that on 20-11-2002 at about 9.30 a.m. , the accused no.2 Yoram Kadesh had checked in at Hotel Causeway and he was given room no.207. The present appellant came to the hotel on the same day at about 9.00 p.m. and enquired about the Yoram Kadesh. The person on the counter of the hotel contacted Yoram Kadesh in the room no.207 and informed him about the guest and thereafter, the appellant was allowed to go to that room. Thereafter she stayed in that room only till the next day. At about 7.15 p.m. on 21-11-2002 both of them checked out from the hotel. Accordingly entry was taken in the register. There is no dispute about this evidence. P.W.10 Momin Abdul Rashid claimed that he had made the statement before the Customs officer on the basis of information received and the record of the hotel. This statement Exhibit 37 was recorded by P.W.21 Jaspal Sharma on 28-11-2002. It is material to note that statements of both the accused and other witnesses were recorded by the Customs officer under Section 108 of the Customs Act and that being the judicial enquiry ,

the person making the statement is bound to make the true statement. In that statement P.W.10 Momin Abdul Rashid Walimohammed had stated that Daisy, who is the present appellant, had come to the room of Yoram Kadesh with her luggage consisting of one shoulder bag and one cloth handbag. He had also stated that nobody had come to meet them from the outside. In view of the statement Mr.Jethmalani contended that the evidence collected by the prosecution itself shows that the present appellant had checked in that hotel with only one shoulder bag and one cloth hand bag and there is no evidence to show that she had come to that hotel with Delsey zipper suitcase at the time of entering the hotel or that she had brought such suitcase later on .

17. Plea of the present appellant is that her bag was torn and, therefore, Yoram Kadesh offered her to put her belongings in his Delsey Zipper Suitcase, which she did. When she left the hotel, she was carrying her belongings in one of her own bag and the said Delsey zipper suitcase. About the story of the torn bag, customs officers enquired from the management. Statement of P.W.8 Ajaj Ahmed was recorded by intelligence officers of A.I.U. Mr.Ajoy Ghosh on 22-11-2002 itself. In that statement, Ajaj Ahmed had stated that he had himself shown room no.207 to the

officer. The room was already cleaned by the sweeper of the hotel after the accused persons had checked out from the said hotel and nothing was found in the room 207. In the cross-examination on behalf of the accused no.1, he explained that when the passengers check out from the hotel, room is cleaned within 2-3 minutes and while, cleaning, the material left behind by the passengers are normally thrown away in the dustbin or some important articles found there are kept in the custody. According to the prosecution, the alleged torn bag of the appellant was not found in the room or in the custody of the hotel when the enquiry was made by the officer. If the bag was torn and left behind as useless item, it could not be important article which could be retained or kept in the custody of the management of hotel. It is contended on behalf of the prosecution that no such torn bag was found. However, it appears that as per the statement of Ajaj, room no.207 must have been cleaned within a few minutes after the accused persons had checked out. If the torn bag was found and it was not an important material, possibility of throwing it away in the dustbin by the sweeper could not be ruled out. To rule out possibility of finding such torn bag in the room no.207, the Investigating Officer should have recorded the statement of concerned sweeper. However, statement of the sweeper was not recorded in this

matter. As the room was checked out at about 7.15 p.m. on 21-11-2002, naturally the room must have been cleaned within a short time and if the bag was thrown away in the dustbin , it must have been also taken away next morning. In the present case, the appellant has taken a consistent plea that her bag was torn and therefore, the accused no.2 had offered his suitcase for keeping her belongings. Question is whether her plea to this effect can be outright rejected in absence of proper investigation in that line. It is true that the accused is likely to make a statement favourable to himself or herself and that statement can not be taken on its face value but when such a statement is recorded under Section 108 of the Customs Act, it will be necessary that proper investigation should be made to find out whether that explanation was true or false. While, in the present case, the Customs officers immediately approached Causeway hotel and recorded statements of managers, but though P.W.8 Ajaj Ahmed had clearly stated that sweeper had cleaned the room, the officer did not record the statement of the sweeper before coming to a conclusion that no such torn bag was found in the room. It can not be believed or presumed that P.W.8 Ajaj Ahmed, who was receptionist, would be present in the room when it was cleaned by the sweeper.

18. According to the appellant, the accused no.2 Yoram Kadesh had offered her free journey and holiday at Berlin and then free journey from Berlin to Australia and she was allured to accompany him and to visit to Berlin so that she could also meet her friends. Of course, the statement of the accused no.2 does not provide any corroboration to her. Another reason given by her was that according to Yoram Kadesh he had excess baggage and, therefore, he wanted her company so that excess baggage could be shared. Mr.Mehta the learned counsel for the C.B.I. contended that there is no material to show that the accused no.2 Yoram Kadesh had any excess baggage with him as only two hand bags were found with him. They were not checked in and it appears that weight of the same must be less than 20 kgs., which is permitted to the passengers travelling by the economy class. Immediately after this incident near the counter of North West airlines , P.W.11 Jubin George had given report Exhibit 41 to the Air Intelligence Unit. That report reveals that the said suitcase was physically searched. After emptying contents of the said suitcase, it was found to be very heavy, weighing 19 kgs. If this suitcase was of the accused no.2, naturally weight of his baggage, including two bag, which were not checked in, would be much more than 20 kgs. If it is believed that this suitcase was infact provided by the accused

no.2 to the appellant then her explanation that because of the excess baggage she was invited to join him can not be thrown away.

19. P.W.20 Joseph F. Xavier Ferrao, who was Assistant Commissioner of Customs at Panaji during the relevant period, deposed that he had received a fax message from the Deputy Commissioner Customs, Air Intelligence Unit, Bombay to the effect that they had seized 10 kgs. of Hashish at Mumbai Air Port and Joseph was asked to take follow up action at Panaji. Exhibit 65 is a fax message dated 4-12-2002. In that message, Rajendra Singh, Deputy Commissioner of Customs, had stated as follows:

"INTELLIGENCE GATHERED BY THIS DEPTT. REVEALED THAT MR.KADESH YORAM AND HIS ACCOMPLICES RONNIE KADESH (BROTHER) ARE DEALING IN NARCOTIC FROM A SHOP NAMED "HORBIT" SITUATED IN GOA, ANJUNA BEACH IN THE GUISE OF A CURIOUS SHOP. HE IS ALSO RUNNING A SHOP ALONGWITH MR.RONNIE KADESH IN MANALI BY THE SAME NAME "HORBIT". THE NARCOTICS ARE TRANSPORTED TO GOA FROM THIS SHOP IN MANALI."

20. It is also stated that hotel record of Yoram Kadesh revealed that he had made call to Goa and Delhi from hotel Causeway and in view of this Mr.Joseph was requested to make necessary enquiry and other investigation as regards antecedents and activities of Yoram Kadesh. Mr.Joseph deposed that fax message was

received by him after 18 days and thereafter he made enquiry to locate restaurant styled as "Horbit" run by Israeli National. Hotel was located but no activity of drug trafficking was going on in the hotel because he had received fax message after 18 days. It indicated that even if there was drug trafficking from that hotel run by the brother of Yoram Kadesh, such activities must have been stopped after his arrest at the airport. It is material in this matter is that according to the message received by the Customs Department, Yoram Kadesh and his brother Ronnie Kadesh were dealing in narcotic drugs from the shop named "Horbit" situated at Goa as well as Manali in Himachal Pradesh. Therefore, according to the customs department he was habitual drug trafficker.

21. It is important to note the stand of the prosecution as regards the Delsey zipper suitcase. After the investigation, complaint was filed by P.W.22 Jaykumar, the Superintendent of Customs. In paragraph 20 of the complaint, it was submitted that the accused acquired, possessed, stored, transported the said 10 kgs. of Hashish which was recovered from the seven packets found concealed in the false bottom of the Delsey zipper suitcase, which was attempted to be checked in piece of baggage of accused no.1 while

travelling to Berlin via Amsterdam by KLM North West flights on 22.11.2002 and which was given by the accused no.2. (emphasis supplied) Identical statement is made in paragraph 21 of the complaint also. It indicates that according to the prosecution also Delsey zipper suitcase was given by the accused no.2 to the accused no.1 and an attempt was made to check in Hashish in the said suitcase in the piece of baggage of the accused no.1. It indicates that even the customs officers working in A.I.U. were satisfied that the said Delsey zipper suitcase actually belonged to the accused no.2 and he had given that bag to the accused no.1. It may be noted that charge was framed by the Special Judge at Exhibit 2. In second and third paragraph of the charge, same words as quoted above were used by the Special Judge indicating that even while framing the charge against the accused, they were informed that the accused no.2 had given Delsey zipper suitcase to the accused no.1 and attempt was made to check in Hashish in that bag with the baggage of the accused no.1. This stand of the prosecution and the charge framed against them is consistent with the plea taken by the accused no.1 that the bag was supplied to her by the accused no.2 and she was not aware about its contents.

22. According to the statement by the appellant

before the Customs officer, when she opened the said Delsey zipper suitcase to keep her belongings, she found that there was some more zipper inside and she felt some strong smell. She tried to open that zipper but it was jammed up and could not be opened. After arrival of the accused no.2, she asked him whether there was anything objectionable and out of the way in the said bag but he assured that it contained only gifts of incense sticks. The conduct of the appellant and the accused no.2 is important. She checked in her baggage including the Delsey zipper suitcase. After it was X-rayed, the officers of the airlines found that there was something suspicious. They asked the appellant and the accused no.2 as to whom the said bag belonged. As per the evidence of P.W.13 Praful Sawant, the accused nos.1 and 2 discussed for 30 seconds and then the appellant stated that the suitcase belonged to her. If she would be aware that the false bottom of the suitcase consisted of Hashish or drug, she would not admit that it belonged to her and that too after discussion with the accused no.2 for some time. Discussion for some time between the two indicates that she felt that the airlines officer were finding something wrong with the bag but possibly, she was assured by the accused no.2 that there was nothing wrong and therefore, she reiterated that it was her bag. If she would be aware that it contained contraband drug,

she could immediately sense trouble and deny her possession over the same.

23. If we recaptulate all the facts and circumstances, it would appear that when she checked in at Hotel Causeway, she was having only shoulder bag and one cloth bag in the hand. Nobody had seen her carrying any Delsey zipper suitcase. Nobody met her during her stay in the hotel. According to her suitcase was given to her by the accused no.2 to keep her belongings in the same as they have to travel together to Berlin as pointed out earlier. According to her, torn bag was left in the room but the investigating officer did not record the statement of the concerned sweeper to find out truth or otherwise, in that statement. The said suitcase itself was weighing about 19 kgs. Including that suitcase baggage of the accused no.2 would be much more than 20 kgs. This provides corroboration to her statement at the airport. She claimed that it was her bag and even after discussion with the accused no.2 for some time, she told the airlines officer that bag belonged to her. It indicates that she did not suspect that there was any contraband or drug in the bag. Even though in his first statement before the Customs Officer, the accused no.2 stated that he had seen the said suitcase in the room when he came back from the

airlines office at about 3.00 or 4.00 p.m., in his second statement when it was specifically put to him that whether the suitcase belonged to him, he only stated that he had seen the said suitcase in the room but specifically did not deny its possession or ownership over the same. Not only the passport of accused no.1 was with accused no.2, even the baggage claim tags were attached to the ticket of accused no.2, which indicates that accused no.2 maintained his control and possession over the said bags. Once the bag was found in her possession, it will be presumed that she was in possession of the narcotic drug also and the burden of proving that she was not in possession or was not in conscious possession was on her. She has to rebut that evidence and the standard of that proof is beyond the reasonable doubt. As explained by the Supreme Court, there should be strong doubt in the mind of the Court about possession of the accused over the narcotic drugs. Taking into consideration all the circumstances and the facts of the case, I find that appellant has rebutted that burden. Overall evidence on the record creates strong doubt about her conscious possession over the Hashish found in the false bottom of the said Delsey zipper suitcase. Taking into consideration all the circumstances, I find that the prosecution has failed to prove conscious possession of

the present appellant over the said Hashish contained in the Delsey zipper suitcase.

24. Next question is about confession made in the statement under Section 108. It was argued on behalf of the prosecution that she admitted in her statement before the Customs officer that it was her first offence and it amounts to confession. Mr. Jethmalani vehemently contended that one sentence can not be chosen and picked up from her statement to hold that she had confessed the commission of offence. He rightly contended that whole of the statement has to be read to find out whether it was exculpatory or inculpatory statement. In view of the explanation given by her in the statement, it is clear that she nowhere admitted that Hashish, which was found concealed in the false bottom of the Delsey zipper suitcase was belonging to her or that she had kept the same or she was aware about the same. It appears that the learned trial Court itself referred to several authorities from Privy Council and the Supreme Court to support the contention that exculpatory statement can not be treated as confession.

25. In **Palvinder Kaur v. The State of Punjab, AIR 1952 Supreme Court 354**, the Supreme Court observed as

follows in paragraph 16:

(16) The statement read as a whole is of an exculpatory character. It does not suggest or prove the commission of any offence under the Penal Code by any one. It not only exculpates her from the commission of an offence but also exculpates Mohinderpal. It states that the death of Jaspal was accidental. The statement does not amount to a confession and is thus inadmissible in evidence. It was observed by their Lordships of the Privy Council in *Pakala Narayanaswami v. Emperor*, A.I.R. 1939 P.C. 47, that the word "confession" as used in the Evidence Act cannot be construed as meaning a statement by an accused suggesting the inference that he committed the crime. A confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession. A statement that contains self-exculpatory matter cannot amount to a confession, if the exculpatory statement is of some fact, which if true, would negative the offence alleged to be confessed.....

In view of this legal position if statement of the appellant before the Customs officer is read as a whole, it is impossible to come to a conclusion that it was inculpatory statement or confession about the commission of crime about the narcotic drug. Infact, she had consistently tried to explain that she was not aware about the contents of the false bottom of the suitcase and she had simply kept her belongings in the suitcase without any knowledge about Hashish in it.

26. Taking into consideration the evidence and the circumstances in the totality, I find that even though Hashish was found in the false bottom of the suitcase checked in by the present appellant, she has rebutted the presumption of her knowledge about the contents of the same.

27. In view of the evidence and the circumstances discussed above, I find that the prosecution has failed to prove that the accused/appellant no.1 had committed the offences. Therefore, the impugned judgment and order of conviction can not be sustained and the appeal has to be allowed. In the result, the appeal is allowed.

28. Impugned judgment and order of conviction and sentence are hereby set aside. The appellant/accused no.1 Daisy Angus is hereby acquitted of the charges levelled against her and she be set at liberty forthwith if not required in any other case.

29. At this stage Mr.Mehta the learned counsel for the respondent makes a request that passport of the appellant should not be released for a period of four weeks and she should be directed to report at some local police station at Bombay till then. The request is

strongly objected by the learned counsel for the appellant. The appellant is a young lady. She had come to India for a short period and she is in jail for a period of about 4 and half years and particularly when after discussion of whole evidence it is found that she is not guilty, there is no justification to detain her in India for a further period of 4 weeks. However, Mr.Jethmalani makes a statement that she will undertake to remain present before any Court, as may be directed, in future in respect of the present case. He also states that xerox copies of her passports may be retained and she shall also supply her permanent residential address so that any notice or warrant can be served or executed against her. This appears to be just and reasonable. I hereby direct that at the time of release of the appellant/accused no.1 from jail, she shall supply her permanent residential address for the purpose of communication and she shall also give written undertaking that as and when in this matter she is required to attend any Court in India, she will abide by the directions and appear before the Court. Copies of her both the passports, British as well as French, shall be taken and retained by the Air Intelligence Unit. The original passports should be returned.

(J.H.Bhatia, J.)